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Issue Date: 29 June 2004

CASE NO.: 2003-LHC-1251, 1252
OWCP NO.: 06-185531, 02-129339

In the Matter of:

MARVIN W. COLE,
Claimant,

v.

SCAFFOLD RENTALS & ERECTION CO.,
SUN INTERNATIONAL DEVELOPMENT,
Employers,

and

ACE/INA INSURANCE COMPANY,
Carrier.

Appearances: Ralph R. Lorberbaum, Esq.
For Claimant

Robert S. Glenn, Esq.
For Employer Scaffold Rental & Erection Co.

Michael D. Bon, Esq.
For Employer Sun International

Ben Cristal, Esq.
For Carrier

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking a determination that his claim satisfies the jurisdictional requirement of the LHWCA.

Procedural History

On July 21, 2003, a formal hearing was held in this case in Savannah, Georgia at which all parties were afforded the opportunity to present evidence with respect to whether Claimant's injuries occurred upon or adjacent to the navigable waters of the United States and whether he was engaged in maritime employment at that time as required by Sections 3(a) and 2(3) of the LHWCA, respectively.[1] 33 U.S.C. §§ 903(a), 902(3). Claimant offered exhibits 1 through 23 which were admitted into evidence (exhibit marked as CX 20 was subsequently withdrawn).[2] Scaffold Rentals & Erection Co. ("Employer") offered exhibits 1 through 23 and Sun International Development Limited offered exhibits 1 through 3.[3] ACE/INA Insurance Company offered one exhibit. All these exhibits were admitted into evidence. Both Claimant and Employer filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUE

Whether Claimant's alleged injuries occurred upon or adjacent to the navigable waters of the United States?

Whether Claimant was engaged in maritime employment at that time of his alleged injuries?

FINDINGS OF FACT

Marvin W. Cole

Claimant testified that he was born on June 20, 1949 (Tr. 20). He is 6 foot 7 ½ inches tall. *Ibid.* He did not receive any education or vocational training beyond high school. *Ibid.* After high school, he worked briefly for General Motors and was subsequently drafted in the Army (Tr. 20-21). He served in Vietnam in 1969 and 1970 as a "shotgunner" on Jeep convoys (Tr. 21). For his service Claimant was awarded a Purple Heart and a Bronze Star, and was honorably discharged from the military in 1970. *Ibid.*

Claimant testified that he was injured while working at a construction site located on Paradise Island in the Bahamas, on a project called Atlantis II, which was the second phase in the

[1] At the June 11, 2003 pre-hearing telephone conference, the parties agreed to bifurcate the claim and, thus, to limit the July 21, 2003 hearing to the issues of LHWCA jurisdiction and (if necessary) identifying the liable insurance carrier (Trans. at 8-13). During the hearing, only the jurisdictional issue was addressed by the parties.

[2] The following abbreviations will be used as citations to the record: "Tr." for Transcript; "CX" for Claimant's Exhibits, "SREC" for Exhibits of Scaffold Rentals & Erection Co., "Sun" for Exhibits of Sun International Development, and "ACE/INA" for Exhibits of ACE/INA Insurance Company. In addition, "Emp. Br." will be used for Employer's Post-hearing Brief, and "Cl. Br." will be used for Claimant's Post-hearing Brief.

[3] Hereinafter I will refer to Scaffold Rentals & Erection Co. as "Employer." Because this Decision and Order is limited to the issue of jurisdiction, any such references are provided solely for the convenience of the reader and are not intended to resolve the liability dispute between Scaffold Rentals & Erection Co. and Sun International Development Limited with respect to Claimant's claim for compensation.

construction of the Atlantis Hotel and the Atlantis System (Tr. 21-22).[4] Claimant had previously worked for Employer for four or five years as an "erector," assembling and disassembling scaffolding, and those were his primary duties on the Atlantis II project. *Ibid.* His first injury occurred after he had been working on the project for approximately four months. *Ibid.*

According to Claimant, the scaffolding he was using was transported from the United States by a ship that docked in the Bahamas (Tr. 23). The scaffolding was unloaded on the other side of the bay, transported to the project site by a barge, and then carried by a "Lull" to a stockyard, where the workers could pick it up (Tr. 24).

Claimant stated that he volunteered to work on this project for one year. *Ibid.* He provided the following description of the area surrounding the hotel as of the time he first arrived. On the ocean side, there was a big inlet or lagoon, which "came under the hotel, around to the other side, the side that we were working on." *Ibid.* The lagoon was a large body of ocean water that rose and fell with the tide, and Claimant observed in it fish that came from the ocean (Tr. 24-25). Between the lagoon and the ocean there was a small jetty to reduce the wave action (Tr. at 25).

Claimant explained that his first injury did not take place on the lagoon side, but rather on the other side of the hotel ("the harbor side" or "the marina side"). *Ibid.* Claimant provided the following description of the area on the harbor side of the hotel as he observed it when he first arrived on the site. He stated that for purposes of this construction, a "levee" had been built around the outside edge of the hotel and casino to create room for the workers and allow for access to equipment (Tr. 26-27). Referring to a photograph, Claimant described the levee as the area "where they had pushed up dirt, piled up dirt . . . like a dam to stop the amount of water that was there" (Tr. 26; Tr. 43; CX 16). The area where the levee was built used to have ocean water, which came from under the hotel, "plus the excess for the homes where they had their yachts and sea going vessels" (Tr. 27). There was still a body of water remaining between the levee and a group of local homes, and Claimant observed piers and docks next to these homes. *Ibid.* Claimant added that if a levee had not been built, the Lull would not be able to bring scaffolding to the site because it would have to cross the water. *Ibid.*

Claimant explained that there was water underneath the "casino part of the hotel" (but not underneath the hotel itself) because the casino was built on stilts (Tr. 28). Claimant noted that the water under the casino rose and fell with the ocean tide. *Ibid.* In the Bahamas, Claimant lived in a Holiday Inn, which he believed belonged to Employer, and he walked approximately a quarter of a mile to get to his worksite. *Ibid.*

Claimant further testified that he initially installed scaffolding on the inside of the casino and later "around the outside of the building . . . [w]here they were going to do the stucco work and build the dock work . . . ." (Tr. 29). Claimant explained that "they couldn't have built the dock work around the outside until we got through with our scaffolding work," because the scaffolding would have been in the way (Tr. 29).

[4] Claimant clarified that the project involved new construction rather than renovation (Tr. 29).

Next, Claimant described the task he performed when he was first injured. He testified that in order to scaffold the outside of the building, he had to "start out in the ocean part of it [since] . . . there's water all around the outside of the building" (Tr. 30; SREC 16 at 1). He described the area where he was working, using a photograph as a reference (SREC 16 at 1). The photograph shows a wall of a building under construction, covered with scaffolding and surrounded by a narrow stretch of water. *Ibid.* Claimant testified that the photograph also shows "the base that we set up, and then the scaffolding that was built on top of the base." *Ibid.* The base had to be erected first, and it went all the way to the "sea floor." *Ibid.* He stated that in order to erect the portion of the scaffolding that was submerged in the water, "[w]e had to hold our breath and go under the water and erect it, each individual piece by piece" (Tr. 31). When Claimant was working in the water, he was assisted by another worker who stood "on the side of the building" and handed him pieces of scaffolding. *Ibid.* When he was ready to proceed to the next piece of scaffolding, he would either swim or just push himself using the vertical pieces of scaffolding called "uprights." *Ibid.*

Claimant testified that the water that he was working in was approximately eight feet deep when the tide was low, and 12 to 15 feet deep when the tide was high. *Ibid.* In this water he observed fish, including grouper and barracuda. *Ibid.* In order to erect scaffolding on the ocean floor, the workers had to hold their breath, dive down, and then connect the pieces. *Ibid.* Claimant testified that the bottom of the scaffolding had jacks (Tr. 32). He had to attach pieces of plywood measuring one foot square to the bottom of the jack which was inserted into the bottom of the upright. *Ibid.* The upright was "put on the bottom of the floor." *Ibid.* Then vertical and horizontal pieces of scaffolding were attached. *Ibid.* Thus, he was working from the ocean floor up. *Ibid.* Claimant testified that the under-water portion of the scaffolding was not shown on the aforementioned photograph. *Ibid.*; SREC 16 at 1. The scaffolding was not allowed to touch the building because other workers had to do stucco work, and it had to be completed and removed before other workers could come in and do the "dock work" (Tr. 33).

According to Claimant, there was only one other worker that had to go into the water to erect the scaffolding: "One of us would be watching the other one to make sure everything was going okay. The other one would be doing the attachments . . . ." *Ibid.* The worker that was watching had his head in the water and was using a snorkel tube and a face mask (Tr. 33-34).

Claimant testified that when he was first hurt, he was in the water "at the bottom attaching the scaffolding." *Ibid.* He explained that "I had held my breath as long as I could, I pushed off the bottom of the ocean, came up, caught a horizontal bar with the back of my head." *Ibid.* The impact knocked his snorkel tube and his mask off, but it did not knock him out or "knock a knot on my head," so he continued to work. *Ibid.* However, according to Claimant, the injury caused a bruise inside his skull. *Ibid.* Claimant testified that several workers heard the noise when he hit the scaffolding, including his diving partner, Mike Sloan, and the people supplying the material. *Ibid.* Claimant stated that he did not realize that he was hurt and continued working for approximately six more days (Tr. 35). He stated that at the end of this period, "when I climbed to the top of the scaffolding to continue working I passed out, fell to the metal deck and had a seizure." *Ibid.* At that point, he sought medical attention for the first time and had to miss work. *Ibid.* He traveled to the United States to receive medical care, but later

returned to work as a scaffolder on the same project in the Bahamas, albeit with some limitations (Tr. 36).

After he returned to work, Claimant had another accident, which he described as follows:

> [R]ight after I went back I was put back doing the same work. I was disassembling the scaffolding on the opposite side of the building. I was climbing down the scaffolding, my right arm was weak. I lost control with my right arm; I wasn't able to hold on. I fell. I jammed my hand in – all I could think about was falling and hurting myself again. I was trying to grab hold of anything. I jammed my arm in between some bars and that stopped me from falling.

Ibid. He clarified that this accident occurred on the lagoon side of the hotel (Tr. 37). At the time of this accident he was working on the scaffolding, and the base of this scaffolding was "all down in the water." *Ibid.*

Claimant referred to a drawing of the completed Atlantis project and testified that it accurately depicted the location of the lagoon (SREC 17; Tr. 37). He reiterated that he was first injured on the harbor side of the casino, "right where it says Casino [in the picture]" (Tr. 38; SREC 17). He testified that, according to the picture of the completed project, on the harbor side of the casino there is now a marina and a waterway that goes "out of the picture." *Ibid.*; SREC 17. He explained that that area of the marina did not have water in it when he was working on the project and instead was covered with dirt (Tr. 38-39). However, it was subsequently filled with water, and the drawing depicts symbolic boats in the marina as well as docks located next to the hotel and next to the homes on the other side of the marina (identified in the picture as "Harborside Resort at Atlantis") (SREC 17). Claimant indicated that, at the time of the accident, there were no docks next to the homes on the opposite side of the marina across from the hotel (Tr. 39).

Claimant also worked on disassembling the scaffolding, and some of it was sent back to America (Tr. 39-40). He had never worked under water before, so Mike Sloan showed him how to do it (Tr. 40). Sloan told him that if he was not willing to work under water, there were 25 workers "back at the shop" who would be willing to take his job. *Ibid.*

Claimant referred to yet another photograph and testified that it showed the area where he worked when he was first injured while working under water (Tr. 40-41; SREC 21). Claimant testified that he was injured next to one of the archways located next to a tall tower (Tr. 41-42).[5] Claimant pointed out two docking areas with several docked yachts, one adjacent to the area where he was hurt and another in the front part of the photograph (Tr. 43). He testified that the docks were not yet built when he was working on the project, since scaffolding had to be completed and removed before "they could do their docking and filling back up with water." *Ibid.* He concluded that the area where he was first injured later became the area "where all the[] Boats are docked" (Tr. 44). He reiterated that at the time of his injury the area of the marina was

[5] To clarify, Claimant noted that in the picture the tower is located immediately to the right from the writing that reads "Luxury in an Untamed Land," near the top of a large white yacht. *Ibid.*

filled with dirt that formed a levee, and testified that the dirt was later dredged out (Tr. 43-44; SREC 16; SREC 17).

Another photograph offered into evidence showed an aerial view of the area where Claimant was first injured (Tr. 44; Sun 1). Claimant testified that this photograph accurately reflected the appearance of this area at the time he worked on the project (Tr. 46).[6] The photograph showed that the water, apparently from the lagoon, flowed underneath the casino and emerged on the harbor side of the hotel, forming a narrow stretch of water along the side of the building (Sun 1). The photograph further showed that the area which later became the marina was a large area of bare land separated from the wall of the casino with the aforementioned narrow stretch of water. *Ibid.* Claimant testified that this photograph showed the scaffolding that he was erecting when he was injured, built around the portion of the building with a tower and two archways (Tr. 45; Sun 1).

According to Claimant, he was first injured in December 1997, left the project in March 1998, and returned in approximately July 1998 (Tr. 46, 48).

On cross-examination, Claimant testified that prior to his experience on the Atlantis project, he had never performed any work for Employer near water (Tr. 51). To his knowledge, during the course of his employment, Employer did not build any docks, and the crews that Claimant was working with had not worked in any shipyards or marinas. *Ibid.* Claimant stated that Employer's company is based in Kennesaw, Georgia outside of Atlanta. *Ibid.* He acknowledged that, as far as he knew, the scaffolding he erected for the Atlantis project served only one purpose: to allow other workers to stucco the outside surface of the building (Tr. 52). He also stated that Employer was one of several subcontractors working on the project. *Ibid.* Claimant acknowledged that prior to his departure from the project in August 1998, Employer was not involved in dredging out any of the soil around the hotel, and none of its work was related to the construction of the docks or the marina at the hotel. (Tr. 53, 55). Thus, the scaffolding erected by Employer had nothing to do with the construction of the docks or the marina (except that it had to be completed and removed for other workers to be able to proceed with the construction of the docks). *Ibid.*

Claimant acknowledged that in his "Claim for Compensation" form, he stated that the nature of Employer's business was "Maritime Builder" (Tr. 54; CX 1). He denied that this is a mischaracterization, and stated that this was an accurate description because Employer was erecting scaffolding, the base of which was in the water. *Ibid.* He further acknowledged that on this form he described his accident as follows: "While diving underwater installing a scaffold base to build a dock employee struck his head on a beam. This has resulted in traumatic (sic) brain injury (sic) and related problems causing him to fall at work on other dates." *Ibid.* Claimant explained that this statement was not untrue because although the scaffolding was not

[6] Claimant noted that the date that appears on this photograph is April, 1998 (Sun 1; Tr. 46). He stated that he was not working on the project in April, and that the photograph reflects some changes that were not yet made when he left the project in March (Tr. 47-48). For example, the photograph shows more levels of scaffolding than existed when he was working there and also some additional progress in construction that was not yet accomplished in March (Tr. 47-49). However, he did not indicate that the general layout of the area was changed and, in fact, testified that it was the same as when he worked on the project (Tr. 44).

used for dock construction while he was present, he did not know how it was used while he was at the hospital, and thus there was a possibility that Employer would use the scaffolding built for stucco work to "attach . . . [the] dock work to the side of the building" (Tr. 55-56).

Claimant testified that the jetty that separated the lagoon from the ocean is not shown on SREC 17 because it was located further out into the ocean from the waterway connecting the lagoon and the ocean (Tr. 58). He observed boats in the lagoon, including paddle boats and flat bottom boats "used to supply the guys with material around the end of the casino . . . where it says Paradise Lagoon, to the left of it" (Tr. 59; SREC 17). He did not know who owned these boats. Claimant explained that during his deposition he indicated that there were no boats in the lagoon while he worked on the scaffold, because he was not working on the lagoon side when he observed these boats (Tr. 59-60). However, when he "went back they were over there" (Tr. 60). He acknowledged that it was impossible for a boat to travel underneath the hotel. *Ibid.*

Claimant reiterated that when he was working on the project, the area on the harbor side of the hotel was land because the water had been dredged out (Tr. 61-62; SREC 17, SREC 16 at 1 (top)[7]). However, there was a narrow stretch of water between the wall of the building and the levee,[8] which started at eight feet and reached a depth of 12 or 15 feet when the tide was high. (Tr. 64, 66; SREC 16 at 1 (bottom); SREC at 3 (top)). There were no boats in this area (Tr. 66).

Claimant testified that his first injury occurred on December 19, 1997 (Tr. 68). When he was first injured, only the base of the scaffolding had been erected at his work site (Tr. 67). He spent three to four weeks in the hospital, and returned to work in mid-January (Tr. 68). However, he was re-admitted into the hospital in the Bahamas for another operation because "[t]he durra busted in [his] head." *Ibid.* He could not recall with certainty how long he stayed in the Bahamas, and added that it is possible that he actually left in January, not in March (Tr. 69). He then identified additional photographs depicting the approximate area where his first injury occurred (Tr. 72-73; SREC 20; SREC 23 at 1 (top)). He noted that one of the photographs accurately depicted the amount of water that "was coming from underneath the casino up to the levee" (Tr. 73; SREC 23 at 1 (top)).

On cross-examination, Claimant reiterated that, at the time of his first injury, the area on the harbor side of the hotel was land and not water (Sun 1). However, there was water in "the inlet that was . . . to the right of the homes" located on the peninsula, but this water did not come close to the casino (Tr. 74-75). The only water close to the building was from the lagoon, and this water was separated by a stretch of land from the water that was near the homes and had no connection with it (Tr. 75). Thus, the water that Claimant was working in came from only two sources: from the lagoon and from a "large pipe that came in from over . . . where the tower was"[9] (Tr. 75-76). Claimant acknowledged that "other than by way of the water flowing into the lagoon the area surrounding the water where [he was] injured was completely landlocked" (Tr. 77).

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[7] With respect to the top photograph, Claimant confirmed that "on the right side there was no water," once again referring to the harbor side of the hotel (Tr. 64).

[8] Claimant again pointed out the dry area around the construction site that he referred to as a "levee" (Tr. 66; SREC 16 at 3 (bottom)).

[9] Claimant specified that he was referring to the tower near the left edge in the center of the photograph (Sun 1).

Claimant testified that at some point there had been a boat that carried supplies across the lagoon. *Ibid.* He never saw this boat leave the lagoon and go into the ocean, but he observed a waterway that this boat could have used to go out into the ocean (*i.e.*, "through the end of the lagoon") (Tr. 77-79). He stated that there was nothing blocking access to the ocean, and the bridges shown on SREC 17 were not there at the time in question (Tr. 79-80). There was, however, one swinging bridge, which would have blocked the passage of a bigger boat, but the paddle boats would have been able to leave the lagoon, including the boat that he saw in the lagoon (Tr. 80, 84-85). Claimant used this bridge for the first time around the time of his first injury. *Ibid.*

Claimant reiterated that there were jetties at the end of the lagoon, as shown in one photograph (Sun 3). He added that this photograph also showed the equipment that he used and a barge that was going to pick up this equipment (Tr. 82). Claimant noted that before he left the project, he was "building that supply area." *Ibid.* He further testified that the water from the marina flowed right into the harbor through a passage which, according to the photograph, no longer exists (Tr. 87, Sun 3).[10] Instead, the photograph shows another passage which, according to Claimant, did not exist in December 1997. *Ibid.* Claimant testified that when he first arrived at the project site, this water was able to flow under the hotel and into the lagoon (Tr. 88). However, in December of 1997, the water from the harbor side no longer joined with the water from the lagoon, because a levee had been built separating the two bodies of water. *Ibid.*

Claimant further testified that during his employment with Employer he did not build, repair, or dismantle ships (Tr. 90). Claimant stated that he is unaware of whether or not the scaffolding he built was used in building the docks (Tr. 90-91). Claimant again acknowledged that his claim for compensation states that he was injured while "installing a scaffold base to build a dock" (CX 1). He explained that he was referring to the "dock for the scaffolding, not the dock for – I had no idea that there was going to be docks for boats" (Tr. 92). He further explained that the scaffolding dock is the part upon which the erected bars sit (Tr. 93).

Claimant testified that he was receiving benefits through Georgia State Workers' Compensation system for his injuries sustained in December of 1997, and the medical benefits were being paid through Hartford. *Ibid.*

Claimant reiterated that the photograph marked as Sun 1 did not accurately depict the site at the time he returned to the U.S. after his injuries (Tr. 95). He explained, however, that he was referring only to the fact that the picture reflected some additional construction, while the landscape and the geography (including the land and the water) shown in the picture were essentially the same (Tr. 95-96, Sun 1). Claimant further reiterated that he was injured while diving into the narrow strip of water along the side of the building (Tr. 96, Sun 1). Claimant testified that this strip was approximately 10 feet wide. *Ibid.*; SREC 16 at 1 (bottom).

On redirect examination, Claimant stated that the equipment he was using was transported by ship, which docked in Nassau, was then brought to Paradise Island by ship, and later transported to the worksite by a large forklift (Tr. 99-100).

[10] Claimant explained that this passage was to the left of the two white structures that extend into the marina (Sun 3).

Claimant reiterated that although the passage connecting the marina with the harbor that appears in the final version of the project did not exist in December of 1997, there had been another passage connecting the harbor with the water reservoir that later was developed into a marina (Tr. 100-101).[11] Claimant explained that this passage was big enough for a boat to pass through, and he observed boats that apparently belonged to the people that lived in the homes across the waterway from the hotel and casino (Tr. 101). Claimant further testified that the docks were erected before the area was dredged out and filled up with water to create the marina (Tr. 102).

Claimant testified that the flat bottom boats that he observed in the lagoon area were delivering materials, including vertical and upright pieces of scaffolding. *Ibid.* The boats carried equipment "from over on the hotel side over to the casino side." *Ibid.*

Claimant reiterated that after he was first injured, he continued to work for six days, but then was hospitalized (Tr. 103). He could not recall how long he stayed in the hospital before he was released to go back to work. *Ibid.* However, after he resumed work, "[t]he durra busted" and he returned to the hospital for another operation and subsequently was sent to the U.S. *Ibid.* He later returned to the Bahamas (Tr. 104). Claimant reiterated that the area where he was hurt in December of 1997 became the marina. *Ibid.*

Claimant testified that the water that came from the harbor through an inlet (that no longer exists) "came around halfway of the opening that was here. They barricaded it off right above the homes and dredged all that out" (Tr. 105). He stated that the dredging continued for some time in order to "make it deeper to put the docks in there for the large boats" (SREC 21).

Michael Sloan

On direct examination, Michael Sloan testified that at the time of this hearing he was employed by Brand Scaffold Company (Tr. 108). He had worked for Employer for approximately four or five years starting in 1993. *Ibid.* In 1998, he was working for Employer on the Atlantis project as a field supervisor, overseeing the installation and removal of scaffolding in the field. *Ibid.* Prior to the Atlantis project, his projects with Employer involved working on power plants, papermills, hotels, and churches (Tr. 109). He stated that during his employment with Employer he had never been involved in building docks, marine railways or shipyards, or any other structures alongside the water, with the exception of Atlantis. *Ibid.*

He started working on the Atlantis project in November 1997. He described the scope of Employer's work on this project as follows. Employer had a contract to provide the inside and outside scaffolding for the stucco contractor. Specifically, Employer worked on the "low rise area of Atlantis Phase II" (Tr. 109; SREC 17). He explained that this area included the casino[12] and hotel lobby area.[13] *Ibid.* He estimated that approximately 60 percent of the job was on the interior, including drywall, ceilings and vertical walls (Tr. 110). The exterior work constituted

[11] Claimant explained that this inlet no longer exists, but that it used to be on the "left" side of the marina (if one were to face the harbor), as opposed to the inlet on the right side, which was built later (Tr. 101, Sun 3).
[12] Sloan explained that he was referring to number 14 on SREC 17.
[13] Sloan stated that he was referring to number 18 on SREC 17.

the other 40 percent and involved providing scaffolding around the building to enable other workers to apply stucco (Tr. 111). Once the stucco was completed, the scaffold was taken down, and Employer's job was done. *Ibid.* Michael Sloan testified that Employer had nothing to do with the building of the docks or marina, which took place later. *Ibid.* He specified that Employer was not involved in the dredging of the area or of the waterway to the marinas. *Ibid.*

Sloan explained that the scaffolding was shipped to Paradise Island from Nassau in a container and then transported to the jobsite by a forklift (known as a "Lull") (Tr. 112). He testified that he remembers Claimant, and also remembers him getting injured in December 1997. *Ibid.* He stated that Employer started working on the Atlantis project in early to mid-November. *Ibid.* Sloan stated that he witnessed Claimant faint while standing on the top deck of the scaffolding outside the casino area on the marina side (Tr. 113). He testified that Claimant fell face down "to where he was standing" (Tr. 113-14). He also identified the area where Claimant fainted and fell (Tr. 118, 120; SREC 16 at 1 (bottom), *see also* SREC 16 at 6). Sloan stated that Claimant's injury took place on approximately the third level of the scaffolding, at about 18-20 feet (Tr. 113). He further stated that Claimant did not fall off the scaffold, and was transported down with a forklift. *Ibid.* Sloan stated that this was the first injury that he became aware of, but approximately one week later, he was advised that Claimant stated that there had been a previous injury. *Ibid.*

With respect to the first injury, Claimant told Sloan that he had bumped his head a few weeks earlier while he was in the water on the marina side installing the scaffolding (Tr. 114). Sloan stated that he was unaware of this injury prior to this conversation. *Ibid.* Sloan could not recall whether Claimant specified the location of the injury, but he knew where it happened because he knew that Claimant was working underwater on the marina side of the casino. *Ibid.* He pointed out on a photograph the area where he believed Claimant was injured (marked with a number "8" on SREC 22). He described the area on the marina side of the building as follows: "all this was dry land. There was water approximately eight feet out from the edge of the building, but other than that it was dry land. All of my equipment was brought to that are[a] with a forklift" (Tr. 115; SREC 22, Sun 1). He further stated that the photograph marked as exhibit Sun 1 closely approximates the appearance of the site in December 1997 (Tr. 116). He noted that the main difference from then and when the photograph was taken was that it showed "a little more water around the building there than was when we were setting scaffold there." *Ibid.*

Sloan also identified on a photograph the marina side of the hotel (Tr. 117; SREC 16 at 1 (top)). He stated that at the time of Claimant's injury, the adjacent part of the marina had not yet been created, because "[they] were in the process of digging on back over but not right there." Tr. 118. The water in which the base of the scaffolding rested was about chest deep at the deepest point and approximately eight feet wide. *Ibid.* He testified he had never seen any boats in this water. *Ibid.* The water came from under the building, and it would, he said, be impossible to travel under the building by boat because there was a wall reaching above water level "all the way through under the building" (Tr. 119). He explained that the water got on the marina side of the casino because "[t]hey had a pump system that pumped water and kept it on that side of the building" (Tr. 123).

Sloan testified that a different subcontractor worked on creating the marina, and identified a photograph "where they're in the process of digging the marina" (Tr. 119; SREC 16

at 3 (bottom)). Sloan further stated that the scaffolding was erected along the building adjacent to the tower (Tr. 120; SREC 16 at 6 (SREC 23 at 1).[14] To the left of the tower was the area known as the "Hall of Water," where there was no water adjacent to the building (SREC 23 at 2 (top); Tr. 121). He further stated that Claimant's second injury occurred "around to the left . . . of the tower." *Ibid.*; SREC 23 at 2 (bottom).

Next, Sloan identified photographs that depicted "pilings and docks for yachts in the marina." *Ibid.*; SREC 23 at 3. He stated that in order to build these pilings:

> [T]hey drove sheet pilings around the jobsite and dug this marina and kept the water out of it all they could. Which made it a lot easier for them to perform all their work. Once they got all those docks built they pulled the sheet pilings out and water came in and flooded the marina

(Tr. 121-22).

Sloan further testified that in December 1997, the configuration of the lagoon was practically the same as shown in SREC 17 (Tr. 122). At that time, there were two bridges over the lagoon. *Ibid.* According to Sloan, a small boat, like a paddle boat, would not be able to pass under the first bridge because it had "like a cyclone fence, maybe a tighter mesh, across under that bridge," probably intended to keep the fish from escaping from the lagoon (Tr. 122-23). He concluded that one could not get into the lagoon with a boat (Tr. 123).

Sloan recalled that Claimant returned to work in the summer of 1998. *Ibid.* He heard about Claimant being injured for the third time, but only after Claimant left the job. *Ibid.* He stated that when he last saw Claimant at work, he told Claimant to stack the plywood he had spilled while driving a forklift, but he never did (Tr. 123-124).

When asked to explain how the base of the scaffolding was installed in the water, Sloan stated: "[w]e attached a two by two piece of plywood to a . . . leveling jack and wired that to the scaffolding and just set it down in the water" (Tr. 124). He stated that to do this, one occasionally had to go under water because some parts were a "little deeper than your arm could have reached. You would have to duck under water and adjust that jack." *Ibid.*

On cross-examination, Sloan reiterated that the ship that brought scaffolding equipment form the U.S. docked in Nassau, and then the equipment was delivered by a boat to Paradise Island (Tr. 125). He stated that he and his crew were at the project site when the marina was being dug out (Tr. 126). He stated that he was unaware of any waterway connecting the harbor with the area that later became the marina (Tr. 127). When asked whether there was any water in the marina area when he first arrived at the project site, he stated that "[t]here was holes dug in different areas and there was water – there was a little water in the bottom of those holes. I mean, it rained every other day." *Ibid.* He did not pay a lot of attention to the digging of the marina, but he assumed that the sheet pilings were intended to hold back water while the workers were digging out dirt. *Ibid.*

[14] Sloan stated that these two photographs show the same area, apparently referring to the top photograph on page 1 of SREC 23).

He acknowledged that the bottom of the scaffolding that Claimant was erecting on the marina side was resting on the ground under water. *Ibid.* He stated that the scaffolding was subsequently taken down and shipped back to the U.S. (Tr. 128). He added, however, that by then the new bridge had been built, so it was likely that a lot of equipment was driven to Nassau.

Sloan testified that at some point between November 1997 and August 1998, he observed the construction of the docks and piers on the marina side. *Ibid.* He stated that the scaffolding was still up when the work on the marina was conducted (Tr. 129). When asked whether any docks or piers were erected along the hotel and casino area, Sloan stated that "[t]here may have been a place to tie a boat along there." *Ibid.* However, the docks and piers along the hotel that appeared in the photograph marked as SREC 21 were constructed after the scaffolding was removed (Tr. 130). He added that for purposes of building the docks, it did not matter whether or not the scaffolding had been removed. *Ibid.* Sloan acknowledged that in the photograph the dock and the walkway were immediately adjacent to the building. *Ibid.*; SREC 21 The photograph showed another walkway behind the aforementioned tower, but Sloan explained that during the time in question that area was covered with dirt. Tr. 131; SREC 21. Using the numbers marking various areas in the photographs, Sloan specified that the only area where scaffolding was erected in the water stretched from "2," past "6," past "8," and just past the tower marked as "14" (Tr. 132, 134; SREC 22). He added that in the course of the entire project the scaffolding was installed all around the building, but this work was done in sections (Tr. 133).

Sloan indicated that the tallest vertical pieces of scaffolding were 10 feet long, the shortest were 17 inches long, and Employer probably used the 10-foot pieces for the base. *Ibid.* However, he could not determine with certainty how long were the pieces used at the site where Claimant was working at the time of his first injury (SREC 16 at 1 (bottom)).

On redirect examination, Sloan testified that in areas other than those listed above, scaffolding was not situated in the water, including the areas marked as "12," "11," "10" (Tr. 134; SREC 22, Sun 1). He explained that "all of that water you see [in this areas] . . . , all of that was dry when we had the scaffolding there. There was no water in there, and there was no water in the whole marina other than eight foot out from the area from 2 to 14, like those other pictures show." *Ibid.*

Michael Thompson

Michael Thompson testified that he currently works for Brand Scaffold Rental (Tr. 137). He had previously worked for Employer for five years, and in 1997-1998, he was the president and manager for Employer. *Ibid.* He stated that Employer rents, sells, erects, and dismantles scaffolding, and its home office is in Kennesaw, Georgia. *Ibid.* While he was employed with Employer, he participated in projects involving commercial and industrial scaffolding. *Ibid.* Commercial projects involved construction of buildings such as hotels, churches, auditoriums, or apartment buildings (Tr. 137). The industrial projects involved several utilities, such as the inside of boilers, papermills, etc. (Tr. 137-38). He estimated that on the industrial side,

approximately 85 percent of the scaffolding work was done on the interior and 15 percent on the exterior, while on the commercial side the ratio was approximately 50/50 (Tr. 138).

Thompson further testified that Employer was not involved in doing exterior work involving docks, marine terminals, ocean terminals, shipyards, ship railways, or marinas. *Ibid.* In fact, prior to the Atlantis project, Employer had never been involved in any projects that were near or adjacent to the water. *Ibid.* Thompson was familiar with the Atlantis project, as he had originally contracted this project, as a subcontractor, with a company based in Atlanta (Tr. 138-39). He visited that site one to two times a month during its construction (Tr. 139).

He testified that the scaffolding was shipped to a port in Nassau, then ferried across to a holding area (where it went through customs), and then trucked to specific worksites. *Ibid.* Forklifts were then used to unload it and stage it around the worksite. *Ibid.* He explained that Sun had hired a customs company that transported the scaffolding on trucks (Tr. 140).

Thompson further testified that Employer had contracted to do interior and exterior scaffolding for the "low rise." *Ibid.* Originally, he contracted with E. L. Thompson, a drywall contractor based in Atlanta. *Ibid.* This company did part of the stucco work and subcontracted exterior stucco work to another subcontractor. *Ibid.* His supervisor for the project was Mike Sloan (Tr. 141). The scope of Employer's work did not include any construction or preparation for the construction of the marina, docks, condos, beachheads, or anything adjacent to the marina, except for the casino. *Ibid.* It also did not involve any dredging. *Ibid.*

On cross-examination, Thompson testified that his job title at Brand Scaffolding is Division Manager, and he owns this company's stocks (Tr. 142). He also testified that he used to have an ownership interest in Employer's company.

DISCUSSION

As the Supreme Court has previously noted, there are four elements which a claimant must prove in order to receive compensation under the LHWCA:

> [T]he injured person must be injured in the course of his employment, 33 U.S.C. § 902(2) (1982 ed.); his employer must have employees who are employed in maritime employment, § 902(4); the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," 33 U.S.C. § 903(a) (1982 ed., Supp. V); and the employee who is injured within that area must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include — "certain enumerated categories of employees, § 902(3).

Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 45, 23 BRBS 96 (CRT) (1989).

In his post-hearing brief, Claimant alleges that he sustained three injuries while working for Employer, and argues that he satisfies the jurisdictional requirements of the LHWCA with respect to all three injuries (Cl. Br. at 3-12). Employer, in turn, argues that Claimant failed to satisfy the "situs" and "status" requirements with respect to all three injuries (Er. Br. at 3-15). For reasons stated below, I find that Claimant has failed to prove that any of the three injuries he sustained while working for Employer satisfy the jurisdictional requirements of the LHWCA.

A. Situs.

The situs requirement under the LHWCA reaches injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)" 33 U.S.C. § 903(a). Prior to the 1972 Amendment to the Act, a worker injured upon navigable waters of the United States was covered by the Act without any inquiry into what he was doing at the time of his injury. *See* 33 U.S.C. § 903(a) (1970) (amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3) and to expand the sites covered under Section 3(a) landward. In 1983, the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Dir., OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 315-16, 15 BRBS 62, 76-77 (CRT) (1983). The Court further held that any worker injured on actual navigable waters in the course of his employment on those waters is a maritime employee under Section 2(3), and, regardless of the nature of the work being performed, he satisfies both the situs and status requirements unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-24, 15 BRBS at 80-81.

(1) Territorial Waters of United States.

In its motion for summary decision, Employer argues that the situs requirement is not satisfied with regard to all three of Claimant's alleged injuries. In particular, Employer argues that because Claimant's injuries took place in the Bahamas the application of the LHWCA is precluded in this case. Employer points out that Section 902(9) of the LHWCA defines "United States" as "the several States and Territories and the District of Columbia, including the territorial waters thereof," 33 U.S.C. § 902(9), and argues that this definition does not encompass the Bahamas, since these islands collectively form an independent country and are not one of the "territories" of the U.S. (Er. Br. at 9-10). Claimant disputes this interpretation of the Act.

In *Weber v. S.C. Loveland*, 35 BRBS 75 (2001), *aff'd on recons.*, 35 BRBS 190 (2002), the Board held that a claimant injured in the Port of Kingston, Jamaica, is covered under the Act.[15] The Board stated that the Act may apply[16] to injuries that occur in foreign territorial

[15] In addition to the *Weber* decision, Claimant also cites the Board's decisions in *Uddin v. Saipan Stevedoring Co., Inc.,* 30 BRBS 117 (1996), *aff'd sub nom.*, *Saipan Stevedoring Co., Inc. v. Dir., OWCP*, 133 F.3d 717, 31 BRBS 187 (CRT) (9th Cir. 1998) (holding that the Act applies to the Northern Marina Islands) and *Tyndziak v. Univ. of Guam*, 27 BRBS 57, *rev'd on other grounds*, *Tyndziak v. Dir., OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995) (holding that Guam is covered by the Act). However, these decisions are not directly on point because the Board determined that Guam and the Northern Marina Islands, which were commonwealths of the U.S., were "territories"

waters when all contacts, except the sight of the injury, are within the United States. *Ibid*. It explained:

> As stated in *Kollias*, . . . Congress' overriding purpose in enacting the Act was to provide consistent workers' compensation coverage to eligible longshore workers, a goal which would be frustrated by limiting the Act to territorial application. [*Gouvatsos v. B & A Marine Co.*, 26 BRBS 38 (1992), *aff'd sub nom. Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994), *cert. denied* 513 U.S. 1146 (1995)[17]]. Where, as here, the injury occurs in the territorial waters of a foreign nation and claimant is a citizen of the United States, employer is based in the United States, the ship was under American flag, no choice of law issue was raised by the parties, and claimant meets the status requirement of the Act, we hold that the Longshore Act applies. That claimant has a remedy under . . . [state] law is not relevant to the inquiry of whether he also is covered under the Longshore Act. *Kollias*, 29 F.3d at 75.

Ibid.

Unlike the situation presented in *Weber*, Claimant's usual job here did not involve "making repairs, cleaning and painting employer's vessel, loading and unloading cargo, and transferring people to different jobs." On the contrary, Claimant's usual job was as an "erector," assembling and disassembling scaffolding for an employer engaged solely in the business of erecting commercial and industrial scaffolding.[18] There is simply nothing "maritime" in the nature of Claimant's duties, or in the manner in which those duties were carried out. Thus, limiting the Act to territorial application in this case would not frustrate Congress' intent to provide consistent workers' compensation coverage to eligible longshore workers.

Nor, unlike *Weber*, was Claimant injured while aboard an American flag vessel which was afloat in navigable waters in the Port of Jamaica**.** Rather, Claimant was injured while erecting scaffolding utilized in the construction of a hotel on Paradise Island in the Bahamas. While the scaffolding on which Claimant was working may have been erected partially in water, that water was not, as explained below, "navigable" within the meaning of the LHWCA. This case thus does not implicate the same concerns for extending coverage that the Board found

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within the meaning of the LHWCA. *Ibid.* The Bahamas clearly are not "territories" of the United States within the meaning of the Act.

[16] Complainant must still satisfy the situs and status requirements.

[17] In *Kollias*, claimant, a repairman, was injured on board a ship while the ship was in the Yucatan Channel, located between Cuba and the Yucatan Peninsula of Mexico. *Kollias*, 22 BRBS 37 (1989), *rev'd on other grounds*, 29 F.3d 7 (2d Cir. 1994). In *Gouvatsos*, claimant, a repairman, was injured aboard a ship which was 200 miles offshore in the Gulf of Mexico. *Gouvatsos*, 26 BRBS at 38. On appeal to the Second Circuit, the Board's decisions in *Kollias* and *Gouvatsos* were consolidated for decision, and the Court held that the term "navigable waters" includes the high seas without qualification. *Kollias*, 29 F.3d at 75.

[18] Indeed, while the claimant's status under Section 2(3) of the Act was conceded in *Weber*, Claimant's status in this case has been vigorously contested. Furthermore, the employer in this case, SREC, "has not done any exterior work involving dock building, marine terminals, ocean terminals, shipyards or ship railways, marinas, or 'anything at all near . . . or adjacent to the water before the Atlantis project." Er. Br. at 4 *citing* Tr. 109, 137-138.

significant in *Weber*. Claimant is therefore not entitled to benefits since he was not injured within the territorial waters of the United States.

(2) "Navigable Waters" and "Adjoining Areas".

In its motion for summary decision, Employer argues also that Claimant fails to satisfy the situs requirement because his three injuries did not occur upon "navigable waters." The classic definition of "navigable waters," which is not defined in the LHWCA, is found in *The Daniel Ball*, 77 U.S. 557 (1871) which states, in relevant part:

> [Waters] constitute navigable waters of the United States within the meaning of the Acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Id. at 563; s*ee also United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). In *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002), the Board noted that it

> has held that a threshold requirement of the navigability inquiry is the presence of an "interstate nexus" in order for the body of water in question to function as a continuous highway for commerce between ports.

Id. at 8 *citing LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). It further noted:

> Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters for purposes of coverage under the Act.

Ibid. *citing Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978).

While an injury which occurs on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a) of the Act, a claimant may also establish entitlement to benefits if he shows he was injured on a landward area covered by Section 3(a) and he is a maritime employee under Section 2(3) of the Act. Section 3(a) covers injuries occurring "landward" on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a) (1988).

For reasons stated below, I find that the undisputed evidence establishes that none of Claimant's injuries occurred over "navigable waters" or any "adjoining areas" covered by Section 3(a), and he thus does not meet the situs requirement of the Act.

a) Claimant's first injury.

Claimant testified that his first injury took place on December 19, 1997, while he was erecting scaffolding on the harbor side of the casino (Tr. 46, 30-33). He testified that he was injured while diving into a narrow stretch of water (hereinafter identified as a "trench") between the wall of the casino and land that was later turned into a marina (Tr. 30-31, 96; SREC 16 at 1). He testified that he was installing the base of the scaffolding under water on the "sea floor" (Tr. 30) and had to "hold [his] breath and go under the water and erect it, each individual piece by piece" (Tr. 31).[19] Claimant testified that, at the time of the injury, "I had held my breath as long as I could, I pushed off the bottom of the ocean, came up, caught a horizontal bar with the back of my head." (Tr. 34). Claimant further testified that he was not initially concerned about the injury and continued to work. *Ibid.*

According to Claimant, the water that filled the trench in which he was working came from two sources: from the lagoon located on the opposite side of the casino (according to Claimant, the water flowed underneath the casino, which was built on stilts) and from a "large pipe" (Tr. 75-76). Claimant acknowledged that the trench was completely landlocked with the exception of the water flowing from the lagoon underneath the hotel (Tr. 77).[20] As Respondent correctly points out, "SREC Exhibits 16 and 23, Sun Exhibit 1 . . . [confirms] the landlocked nature of [this] work area." (R. Br. at 12). According to Claimant, the trench in which he sustained the injury was eight feet deep when the tide was low, twelve to fifteen feet deep when the tide was high, and approximately ten feet wide (Tr. 64, 66, 96; Sun 1; SREC 16 at 1 (bottom); SREC 3 (top); SREC 23 at 1 (top)). By contrast, Michael Sloan, a field supervisor who oversaw Claimant's duties during the relevant time periods, testified that this trench was eight feet wide and only chest deep at the deepest point (Tr. 118).

Regardless of whether Claimant's testimony is accurate regarding the depth of the water at his work site, it is clear that the water in which the scaffolding was standing at the time of the alleged injury could not support commercial navigation. *See Chapman v. United States*, 575 F.2d 147 (7th Cir.) (en banc), *cert. denied*, 439 U.S. 893 (1978) (natural or artificial waterway which is not susceptible of being used as interstate artery of commerce because of either manmade or natural conditions is not "navigable waters" for purposes of jurisdiction); *Rizzi v. Underwater Constr. Corp.*, 84 F.3d 199 (6th Cir. 1996), 28 BRBS 360 (1994) (diver injured in underground reservoir tank located under paper mill failed situs test as tank did not constitute "navigable waters" within meaning of LHWCA). In fact, Claimant acknowledged that there were no boats in his work area and that it would be impossible for boats to travel underneath the hotel (Tr. 60, 66; SREC 22, 23).

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[19] Claimant added that he was performing this work with one other worker (Tr. 33). While one of them dived under water, the other put his head under water and watched to make sure that everything went well, using a snorkel tube and a face mask (Tr. 33-34). They took turns diving and watching. *Ibid.*

[20] Claimant added that on the harbor side there was another body of water (next to the homes) , but this water did not come close to the casino and was separated by a lot of land from the water in which he erected scaffolding (Tr. 27, 74-75). According to Claimant, this body of water was connected with the harbor by a passage which, according to a more recent photograph, no longer exists, (Tr. 87, Sun 3).[20] Claimant testified that this passage was big enough for a boat to pass through, and he observed boats that apparently belonged to the people that lived in the homes across the waterway from the casino (Tr. 101).

In his post-hearing brief, Claimant argues that "navigable waters did flow underneath the hotel to the site where [he] . . . was injured," referring to the water that flowed into the trench from the lagoon (Cl. Br. at 11). He asserts that the water coming from the lagoon was ocean water because it rose and fell with the tide, and contained ocean fish (Cl. Br. at 3). However, these facts, even if true, are irrelevant because the body of water in which Claimant was injured – *i.e.*, the trench – was incapable of supporting navigation. *Rizzi*, 84 F.3d at 199 (fact that water rushed in and out of reservoir tank in which complainant injured and that claimant subject to "maritime hazards" irrelevant to a determination of navigability; no evidence that tank "used to load, unload, repair, dismantle, or build a vessel" and thus tank also not "adjoining area").

Claimant also argues that prior to his injury, the area where he was injured was covered with water which was "clearly a navigable waterway since yachts and ships would come in and dock there" (Cl. Br. at 11). However, the Supreme Court's definition of "navigable waters" looks at the nature of the situs *at the time of the injury* and includes only waterways "over which commerce *is or may be* carried on." *Appalachian Electric Power Co.*, 311 U.S. at 377 (emphasis added). Claimant's testimony makes it clear that, at the time of his injury, the area surrounding his work site had been dredged and covered with dirt in order to create room for the workers and their equipment to operate, leaving only a narrow trench of water adjacent to the hotel (Tr. 26-27). Thus, when the water was removed and replaced with dirt to facilitate construction, there was no navigable waterway over which commerce was, or could be, carried on.

Similarly, Claimant testified that, according to a photograph of the completed Atlantis project, the land adjoining the trench where he was injured was subsequently dredged out, filled with water, and turned into a marina (SREC 17).[21] However, the fact that the site of an injury will be navigable at some point in the future does not render the site navigable at the time of the injury. *Nelson v. Guy F. Atkinson Constr. Co.,* 29 BRBS 39 (1995) (holding that claimant failed to satisfy situs requirement under Section 3(a) where, at time of injury, he was preparing and excavating area of dry land that would eventually become a navigational lock).

I also find that the situs of Claimant's alleged injury does not fall within the "adjoining areas" covered by Section 3(a). Claimant argues that "[a] breakdown upon which [he] was injured formed a harbor and was therefore the equivalent of a pier." (Cl. Br. at 11-12 *citing Olsen v. Healy Tibbits Constr. Comp.*, 22 BRBS 221 (1989). It is unclear whether this argument refers to Claimant's first injury, but, if so, it would appear that Claimant is attempting to analogize the land adjacent to the trench in which he was injured to a pier (Claimant repeatedly referred to this stretch of land as a "levee") (Tr. 26-27). As Employer correctly notes, however, the Court of Appeals for the Eleventh Circuit has rejected a similar argument in *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390 (11th Cir. 1998). Er. Br. at 14. In that case, the claimant, who was a welder, was injured when he fell from a seawall, the sole purpose of which was to protect an electric company's generating plant from the encroaching Savannah River. *Id*. at 1391. The parties stipulated that the injury occurred in the course of employment, that the

[21] The photograph of the completed project shows several yachts docked in the marina, apparently connected with the harbor by a waterway (SREC 17). After the time of Claimant's accident, but before the marina was created, docks were built next to the hotel and the homes on the other side of the marina (Tr. 39; 43).

employer was engaged in maritime employment,[22] and that the place of the claimant's injury adjoined the navigable waters of the United States. *Id*. at 1392. Thus, the sole issue presented was whether the seawall was a "pier . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *Ibid*. The court found that it was not, stating:

> Even if this court were to adopt . . . [the] pier test [in *Hurston v. Dir., OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT)(9th Cir. 1993), *rev'd on other grounds*] as dispositive of situs, . . . the seawall in this case is not a pier. While the instant seawall, like a typical pier, adjoins navigable waters and rests on vertical pilings anchored in the river bed, it certainly does not "appear[ ] to be a pier." *Hurston*, 989 F.2d at 1549. As the Ninth Circuit stated in *Hurston*, whether a facility is a "pier" is a pure factual question in the absence of a definition in the LHWCA. *Hurston*, 989 F.2d at 1551, 1553. The most persuasive evidence on this issue is, naturally, testimony from an eye-witness who knows a pier when he or she sees one. Here, the supervisor of the seawall construction project with fourteen years of experience unequivocally answered "no," when asked whether the facility was a pier. Photographs of the place of injury corroborate this testimony. Further, the only other witness, Brooker himself, repeatedly referred to the structure as a wall. Therefore, substantial evidence supports the ALJ's implicit rejection of Brooker's pier argument.

Id. at 1394-95.

In this case, Claimant himself repeatedly referred to the area of land adjacent to his worksite as a "levee." When asked what he meant by a "levee," he testified:

> A levee was where they had pushed up dirt, piled up dirt, for like a dam to stop the amount of water that was there. To give you access for our equipment to get up there to us.

(Tr. at 26). The "levee" about which Claimant testified thus served the same purpose as the seawall in *Brooker*, *i.e.*, to keep encroaching waters away from the hotel during its construction. No other witness in this proceeding described this levee as a "pier." I am thus not persuaded by Claimant's argument, made for the first time in his closing brief, that the levee adjacent to the area in which he was working was a "pier" within the meaning of the Act.

Based on the foregoing, I find that Claimant's first alleged injury fails the situs test, as it did not take place upon navigable waters or any adjoining area covered by Section 3(a) of the LHWCA.

[22] Unlike *Booker*, the Employer here contests that it was an employer with employees who engaged in maritime employment under Section 2(4) of the LHWCA.

b) Claimant's second injury.

Claimant testified that his second injury occurred approximately six days after his first injury (Tr. 35). The testimony of Claimant and Michael Sloan indicates that Claimant's second injury took place in the same area as his first injury, except this time Claimant was working on the scaffolding above the water. *Ibid.*; Tr. 113, 118, 120; SREC 16 at 1 (bottom); SREC 16 at 6. According to Claimant, "when I climbed to the top of the scaffolding to continue working I passed [out], fell to the metal deck and had a seizure." *Ibid.*[23] Michael Sloan, who witnessed Claimant's injury, testified that it took place on approximately the third level of scaffolding, at about 18-20 feet (Tr. 113-14). He further stated that Claimant did not fall off the scaffold when he fainted (Tr. 113-14).

Since the site of Claimant's second injury is the same as the site of his first injury, the same rationale applies regarding why he does not meet the situs requirement of the Act, *i.e.*, the waters in which the scaffolding was erected were not "navigable waters." If, however, Claimant intended to argue that the scaffolding was equivalent to a pier, this argument is also without merit. A "pier" as used in the LHWCA denotes a structure built on pilings that reaches from land to navigable water, regardless of whether it is used for maritime purposes. *Hurston, supra.*, 989 F.2d at 1553. As stated above, the water in the trench in which the scaffolding was based was not navigable. Thus, the scaffolding on which Claimant sustained his second injury does not satisfy the definition of a "pier." Claimant's assertion that "a dock was built in the area after the Employee's injury" is also unavailing. *See Nelson*, 29 BRBS 39 (1995) (claimant failed to satisfy situs requirement under Section 3(a) where, at time of injury, he was preparing and excavating area of dry land that would eventually become a navigational lock).

Finally, the location of Claimant's second injury does not fall within the catch-all provision of Section 3(a) that covers "other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). Claimant's testimony makes it clear that the scaffolding in question was not used for any of the aforementioned purposes. Thus, the undisputed evidence establishes that Claimant's second injury did not take place within the covered situs.

c) Claimant's third injury.

According to Claimant, his third injury occurred on the "lagoon" side of the hotel where he was erecting scaffolding on the outside of the building. He described the accident as follows:

> I was disassembling the scaffolding on the opposite side of the building. I was climbing down the scaffolding, my right arm was weak. I lost control with my right arm; I wasn't able to hold on. I fell. I jammed my hand in – all I could think about was falling and hurting myself again. I was trying to grab hold of

[23] According to Claimant, his second injury was a consequence of his first injury. Following his second injury, Claimant spent three to four weeks in the hospital and returned to work in mid-January (Tr. 68). However, he had to return to the hospital for another operation and was subsequently sent to the U.S. for treatment (Tr. 103).

anything. I jammed my arm in between some bars and that stopped me from falling.

(Tr. 36; SREC 17).

As previously noted, jurisdiction under the LHWCA extends only to injuries that occur upon navigable waters or on adjoining covered areas, such as docks, piers, wharfs, terminal buildings, or other such areas customarily used for maritime purposes. *See* 33 U.S.C. § 903(a). For the reasons stated below, I find that Claimant's third injury is outside the jurisdictional reach of the Act.

First, as noted above, the term "navigable waters" means waters which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried . . . ." *The Daniel Ball*, *supra*, 10 U.S. at 563. Based on the testimony presented at the hearing, it is clear that the lagoon adjoining the hotel was not a "continued highway over which commerce is or may be carried on . . . ." *Ibid*. Thus, if the water at the site of Claimant's third injury was not "navigable," his injury is not compensable under the Act.

According to Claimant, there was a lagoon near the hotel which "came under the hotel, around to the other side, the side that we were [first] working on" (Tr. 24). The lagoon was, he testified, a large body of ocean water that rose and fell with the tide, and it contained fish that Claimant believed came from the ocean (Tr. 24-25). He testified there was a boat which was used to carry supplies on the lagoon, although he was not aware of the boat ever leaving the lagoon and was not in the Bahamas when that side of the hotel was constructed (Tr. 77-78). Although he never saw the boat leave the lagoon, however, Claimant believed it could have done so "through the end of the lagoon" (Tr. 77-79). He testified there was nothing to his knowledge blocking access to the ocean, and one of the two bridges depicted in SREC 17 was not there at the time of his injury (Tr. 79-80, 84). There was, however, one swinging bridge, which would have blocked the passage of a bigger boat, but paddle boats he saw on the lagoon and the boat used to carry supplies would, in his opinion, have been able to go under the bridge and leave the lagoon (Tr. 80, 84-85).

Michael Sloan, the field supervisor who oversaw all of Employer's installation and removal of the scaffolding used in the Atlantis II hotel project, testified that the configuration of the lagoon in December 1997 was practically the same as that shown in Sun 1 and SREC 17 (Tr. 116, 122). He testified, contrary to Claimant's recollection, there were two bridges over the lagoon at all times relevant to this case. *Ibid*. According to Sloan, even a small boat, like a kayak or a paddle boat, could not pass under the first bridge because it had "like a cyclone fence, maybe a tighter mesh, across [the water] under that bridge," intended to keep the fish from escaping from the lagoon (Tr. 122-23). He concluded that one could not get into the lagoon from the ocean with any kind of boat (Tr. 123).

I find the testimony of Michael Sloan more persuasive than that of Claimant with respect to whether boats could access the lagoon from the ocean. Sloan was Employer's on-site supervisor throughout the performance of the contract and, as such, was familiar with the entire

project from start to finish. In contrast, Claimant's job was simply to erect and disassemble scaffolding at whatever location he was directed to by his supervisor (Sloan). While Claimant "believed" that a boat could go from the lagoon to the ocean, he testified he had never seen one do so. Sloan clearly and unequivocally testified that boats could not enter or leave the lagoon because of the cyclone fencing which spanned the lagoon inlet under the bridge. Based on the foregoing, I find that Claimant has failed to establish that the lagoon in which the scaffolding was situated when he sustained his third injury was a navigable body of water capable of being used as an interstate artery of commerce within the meaning of the Act. The lagoon and ocean did not "form in their ordinary condition by themselves, or by uniting with [each other], a continued highway over which commerce is or may be carried on . . . ," *The Daniel Ball*, *supra*, 10 U.S. at 563, and Claimant thus does not meet the "situs" test with respect to this injury.

Furthermore, even if the lagoon adjacent to the hotel where Claimant was injured were found to be "navigable," his third injury would not fall within the parameters of the LHWCA. As explained below, I find that Claimant's injury did not occur either "upon the navigable waters of the United States" or "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel[]" 33 U.S.C. § 903(a).

As noted above, Claimant's injury occurred on scaffolding which had been erected in the lagoon adjacent to the hotel. The scaffolding was being utilized solely in the construction of the hotel, was clearly not being used for any maritime purpose, and is analogous to an offshore drilling platform which the Supreme Court has characterized as an "artificial island." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985) *citing Rodrigue v. Aetna Casualty & Surety Co*., 395 U.S. 352, 360 (1969). In describing the offshore drilling rig where the two workers' in *Rodrigue* were killed, the Court wrote in *Herb's Welding*, in relevant part:

> [T]he platforms involved were artificial islands and were to be treated as though they were federal enclaves in an upland State. Federal law was to govern accidents occurring on these islands; but, contrary to the Court of Appeals, we held that the Lands Act and borrowed state law, not the maritime law, constituted the controlling federal law. The platforms "were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." Indeed, observing that the Court had previously "held that drilling platforms are not within admiralty jurisdiction," we indicated that drilling platforms were not even suggestive of traditional maritime affairs.

Herb's Welding, 470 U.S. at 421-22. The Court also stated that, unlike workers on floating structures, workers on "fixed structures" do not enjoy the same remedies as workers on ships who are covered under the Act if they are not members of the crew. *Herb's Welding*, 470 U.S. at 416 n.2.[24]

[24] The Court discussed, *inter alia*, Congress' intent in amending the LHWCA in 1972, and, in doing so, suggested that injuries occurring "on navigable waters" meant that the alleged accident must have occurred aboard a floating vessel. The Court wrote, in relevant part: "The most important of Congress' concerns, for present purposes, was the desire to extend coverage to longshoremen, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, *rather than while actually afloat*.

Claimant's scaffolding, like the drilling platforms described in *Herb's Welding*, was an "artificial island" in the lagoon adjacent to the hotel. It rested on the bottom of the lagoon and protruded upward out of the water next to, but not touching, the hotel. Like the oil platform described by the Court in *Herb's Welding* and *Rodrigue*, the scaffolding was a fixed, rather than floating, structure. The injuries Claimant sustained when he fell on the scaffolding thus did not occur "upon the navigable waters . . . ." 33. U.S.C. § 903(a), and he is therefore not entitled to the same remedies as workers aboard ships who are not members of the ship's crew. *Herb's Welding*, 470 U.S. at 416 n.2.

The only remaining question is whether Claimant's third injury occurred on an adjoining covered area, such as a dry dock, pier, wharf, terminal building, or other adjoining area customarily used for maritime purposes. The evidence clearly shows it did not.

First, only structures and areas adjoining *navigable* water are covered by the Act. *See* 33 U.S.C. § 903(a) (1972). As I have previously determined, the water in the lagoon was not navigable, and the injury sustained by Claimant thus could not have occurred on a covered situs. Second, even if I were to assume the lagoon was navigable, undisputed evidence establishes that the scaffolding located on the lagoon side of the hotel was not a "pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel[]." The scaffolding does not, for example, satisfy the definition of a "pier."[25] As stated above, a "pier" within the meaning of the LHWCA denotes a structure built on pilings that reaches from land to navigable water. *Hurston*, 989 F.2d 1547. There is no evidence in the record before me to suggest that any part of this scaffolding reached land. Claimant and Sloan both testified that the base of this scaffolding was in the water, and the scaffolding was not allowed to touch the building because other workers had to do stucco work. Similarly, the scaffolding is not a "dry dock" used in the construction or repair of ships. *See, e.g.*, *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953) (Burton, J. concurring) (describing three types of dry docks). Nor could the scaffolding be considered any other "adjoining area customarily used for maritime purposes." 33 U.S.C. § 903(a). Thus, regardless of whether or not the lagoon satisfied the definition of "navigable water," the scaffolding upon which Claimant was injured was not an adjoining area covered by the Act.

Based on the foregoing, I find that Claimant has failed to sustain his burden of proving that he meets the situs requirement of the LHWCA.

B. Status.

I further find that even if Claimant satisfied the situs requirement of the Act, the undisputed evidence establishes that he does not meet the Act's status requirement. Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in

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Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 U.S.C. § 903 expressly extended coverage to "adjoining area[s]." *Id*. at 420 (italics added).

[25] I note, also, that a "wharf" is defined as "[a] landing place or pier where ships may tie up and load or unload . . . [a] shore or riverbank." *The American Heritage Dictionary* (2d Col. Ed 1982) 1374. The scaffolding on which Claimant was injured could not be considered a "wharf" for the same reasons it is not a "pier."

maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker . . . ." 33 U.S.C. §902(3)(1988). The term "harbor-worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)."

A number of courts have held that the analysis of the "status" requirement should differ depending on whether or not the injury occurred over navigable waters. *See, e.g.*, *Dir*., OWCP v. *Perini N. River Assocs.,* 459 U.S. 297 (1983); *Herb's Welding v. Gray,* 470 U.S. 414, 17 BRBS 78 (CRT)(1985), *Bienvenue v. Texaco, Inc*., 124 F.3d 692 (5th Cir. 1997). In *Perini*, the Supreme Court held that "[w]hen a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) . . . ." *Perini N. River Assocs.*, 459 U.S. at 324. The Court noted that its holding preserved the jurisdictional scope of the LHWCA as it existed before the 1972 amendments, when "any worker injured upon navigable waters in the course of employment was 'covered . . . without any inquiry into what he was doing . . . at the time of the injury.'" *Id.* at 311 (*quoting* Gilmore and Black, *The Law of Admiralty* at 429-30). Although the recent case law is somewhat ambiguous with regard to the role of the occupational analysis in cases involving injury over navigable waters,[26] it is well-established that claimants who were not injured over navigable waters must demonstrate that they were engaged in "maritime employment." *See, e.g.*, *Herb's Welding*, 470 U.S. at 414; *see also Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989) . Thus, in light of my previous finding that Claimant was not injured over navigable waters, Claimant's reliance on *Perini* is misplaced (Cl. Br. at 12)[27] and he must show that he was engaged in "maritime employment" in order to establish jurisdiction under the LHWCA.

The Supreme Court explained this requirement in *Herb's Welding, Inc. v. Gray*, stating that "[w]hile 'maritime employment' is not limited to the occupations specifically mentioned in Section 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships."[28] 470 U.S. 414, 17 BRBS 78 (CRT) (1985); s*ee generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989).[29] Relying on the status test in *Herb's Welding*, the Board has held that if the employee is not over navigable water at the time of injury, then the employee is engaged in "maritime employment" only if his work is directly connected to the commerce carried on by a ship or vessel. *Bang v. Danos Curole Marine,* BRB No. 96-0598 (Feb. 5, 1997) (Unpublished) (citing *Munguia v. Chevron U.S.A.,*

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[26] While some courts have strictly interpreted the *Perini* holding, *see e.g.*, *R&D Watson, Inc.*, 25 BRBS 137 (1991) (holding that when injury occurs over navigable waters, the status requirement is automatically satisfied), several recent decisions have stressed the significance of the "status" requirement even in cases involving injury over navigable waters, *see e.g.*, *Bienvenue,* 124 F.3d at 692, *Brockington*, 903 F.2d at 1523.

[27] The *Perini* holding is limited to those cases where an employee performs work and is injured over navigable waters. *See Herb's Welding*, 470 U.S. at 414.

[28] The Court noted that this definition of "maritime employment" did not apply to workers injured on navigable waters. *Id.* at 424, n.10, 105 S. Ct. at 1428, n.10.

[29] The court held that the workers injured at coal-mining facilities adjacent to navigable water satisfied the status requirement because their janitorial and equipment repair services were essential to loading or unloading vessels. *Ibid.*

Inc., 999 (1-79 Benchbook) 999 F.2d at 811);[30] *see also Ferguson v. Southern States Cooperative*, 27 BRBS 17 (1993);[31] *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997).[32]

The Eleventh Circuit follows the Supreme Court's directive that "the question of whether an individual is a maritime employee for purposes of LHWCA coverage must be answered by analyzing the employee's 'basic' employment, rather than the employee's particular work at the moment of the accident." *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990) (citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)). Thus, under *Brockington*, "[w]hat matters to a determination of maritime status is the description of [claimant's] *regular* employment."[33] *Id.* at 1528.

In his post-hearing brief, Claimant asserts that he has the requisite status, while Employer argues that any connection between Claimant's work and maritime employment was *de minimis* because:

> Claimant's basic employment as well as his employment at the time of his alleged injury, was erecting scaffolding on land. Moreover, as Claimant accurately testified, the scope of [Employer's] work on the Atlantis II Project was erecting scaffolding to allow the building to be stuccoed by another subcontractor and then removing the scaffolding before the construction of a marina by yet another subcontractor.

(Tr. 52-53).

The undisputed evidence establishes that Claimant's basic employment was land-based and not maritime in nature. Claimant's own testimony establishes that in the course of his employment with Employer his duties had no connection to loading, unloading, building, or repairing vessels; nor was he involved in the construction, repair, or maintenance of harbor facilities. Claimant testified that he was employed by Employer solely as a scaffolding erector, and his primary duties consisted of assembling and disassembling scaffolding (Tr. 21-22). Those were also his primary duties on the Atlantis II hotel project. *Ibid.* Claimant testified that he had never performed any work for Employer in shipyards and marinas, and was never involved in the construction of any docks (Tr. 51). Claimant also testified that while working for Employer, he

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[30] Holding that Claimant's overall duties were maintenance duties related to keeping a natural resources facility operational and producing gas and oil, activities which were not inherently maritime. The court also found that Claimant's duties involved little, if any, loading and unloading, which was conducted solely to facilitate the operation of an oil and gas production facility, which was not an inherently maritime operation under *Herb's Welding*.

[31] Holding that mechanic who modified warehouse roof to accommodate the booms of incoming ships, assisted in docking every incoming ship, repaired machinery essential to the unloading process, and was actually performing maritime function at time of death, is covered under LHWCA.

[32] Holding that claimant injured while repairing shipping containers was doing maritime employment and thus satisfied status test.

[33] Accordingly, the court concluded that the fact that the claimant "loaded and unloaded" materials from the boat at the time of his injury was "largely irrelevant," in light of the fact that he was regularly employed as a land-based electrician. *Ibid.*

did not build, repair, or dismantle ships (Tr. 90). In fact, prior to his experience on the Atlantis II project, he had never worked on projects located near the water (Tr. 51).

At the same time, Employer offered testimony of two witnesses, which establishes that the scaffolding erected by Claimant was used only for stucco work, and not to build docks or any other "maritime" structures. As noted above, Michael Sloan worked on the Atlantis project as a field supervisor and testified that he was in charge of overseeing the installation and removal of Employer's scaffolding (Tr. 108). According to Sloan, Employer's contract on the Atlantis II project was to provide the inside and outside scaffolding for the stucco contractor, and a different subcontractor worked on creating the marina (Tr. 109). Sloan further testified that once the stucco was completed, the scaffold was taken down, and Employer's job was done (Tr. 111). Michael Thompson, who was Employer's president and manager during the time in question, testified that he personally entered into a contract on behalf of Employer to do interior and exterior scaffolding on the Atlantis hotel project (Tr. 137-40). He, like Sloan, testified that the scope of Employer's work on the project did not include any construction of the marina, docks, condos, beachheads, or any other structures adjacent to the hotel's marina (Tr. 141). Thompson, like Sloan, testified that Employer never worked on projects involving docks, marine terminals, ocean terminals, shipyards, ship railways, or marinas in the course of his five-year employment (Tr. 138).

As previously noted, the Supreme Court denied LHWCA coverage in *Herb's Welding* to a welder injured on a fixed offshore oil-drilling platform. *Herb's Welding*, 470 U.S. at 414. In applying the "occupational test," the Court stated that the 1972 amendments to LHWCA "were not meant to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." *Id.* at 424 (citing H.R. Rep. No. 92-1441, p. 11 (1972), U.S. Code Cong. & Admin. News 1972, pp. 4698, 4708. S. Rep. No. 92-1125, p. 13 (1972)). The Court held that the welder did not satisfy the "status" requirement of the LHWCA because there was nothing "inherently maritime" about the tasks he performed as "welding work was far removed from traditional LHWCA activities." *Id.* at 425, 105 S. Ct. at 1428. The Court noted that "the required maritime employment status did not cover all those who breathe salt air." *Ibid*.; *see also McGray Constr. Co. v. Dir., OWCP*, 181 F.3d 1008 (9th Cir. 1999) (holding that a pile driver injured on a marine situs failed to satisfy the status test).

Similarly, in *Brockington*, the Eleventh Circuit concluded that a land-based electrician who contracted to do wiring at a construction site on an island off the Georgia coast, and who sustained injuries on navigable waters while traveling to his worksite by boat, was not a covered employee under § 902(3). *Brockington*, 908 F.2d at 1528. The court concluded that there was nothing inherently maritime about his task as an electrician and the "maritime environment" in which he was injured had no connection to the general nature of his employment. *Ibid.* While I have previously determined that Claimant was not injured on navigable waters, the *Brockington* decision illustrates the Eleventh Circuit's strict interpretation of the status requirement, which Claimant fails to satisfy.

In his post-hearing brief, Claimant cites a number of cases in support of his argument that he satisfies the status requirement. As explained below, I find Claimant's reliance on these cases is misplaced.

In particular, Claimant relies on *Graziano v. Gen. Dynamics Corp.,* 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), rev'g 13 BRBS 16 (1980). (Cl. Br. at 11). However, the court's finding of status in *Graziano* was based on its conclusion that maintenance of the structures housing shipyard machinery, and in which shipbuilding operations are carried on, is no less essential to shipbuilding than is the repair of the machinery used in the process itself. *Ibid.* By contrast, as stated above, there is absolutely no evidence that Claimant's employment was in any meaningful way related to shipbuilding or construction of any maritime structures. On the contrary, Claimant was involved in the construction of a hotel. Although the hotel ultimately had an adjacent marina, neither Claimant nor his Employer had any involvement in that aspect of the construction project.

Claimant also cites *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), for the proposition that:

> [T]he claimant was covered under the Act regardless of whether his overall employment had a realistically significant relationship to traditional Maritime activities involving navigation and commerce on navigable waters. The 5th Circuit held that it was enough that the claimant's job at the time of injury had such a relationship.

(Cl. Br. at 11). However, as stated above, this approach has been explicitly rejected by the Eleventh Circuit. In determining an employee's status, the Eleventh Circuit looks to the employee's regular occupation, not his duties at the "moment of injury," s*ee Brockington*, 903 F.2d at 1528. I also note that even under the "moment of injury" approach, Claimant does not satisfy the status requirement since his work at the time of the injury was not maritime in nature. In *Gillia*m, the court found that there was a realistically significant relationship between Claimant's duties and maritime activities at the time of his injury because claimant, a construction site foreman, was supervising and actually assisting in the unloading of cargo consisting of pilings from a barge used in the building of a bridge. *Gilliam*, 659 F.2d at 54. The loading and unloading of vessels, unlike erecting and disassembling scaffolding, is clearly a "maritime" activity performed on a regular basis by longshoremen. Thus, even if *Gilliam* applied, which it does not, it would be distinguishable from this case.

The complete lack of any meaningful relationship to maritime activities also distinguishes Claimant's case from two other cases cited in his post-hearing brief. For example, in *Ferguson v. S. States Coop.*, the Board held that a mechanic who modified a warehouse roof to accommodate the booms of incoming ships, assisted in docking every incoming ship, repaired machinery essential to the unloading process, and was actually performing a maritime function at the time of his death, was covered under the LHWCA. 27 BRBS 16 (1993) (Cl. Br. at 12). Similarly, in *Ctr. v. R&D Watson, Inc.*, the claimant regularly engaged in indisputably maritime employment as a dredgerman, even though at the moment of injury his task was not maritime in nature. 25 BRBS 137, 139 (1991). As noted above, Claimant's duties involving the installation

and removal of scaffolding is not inherently maritime, and the cases cited by counsel are therefore inapposite.

Finally, Claimant argues that this case is governed by *Randall v. Chevron U.S.A. Inc.*, in which the "5th Circuit . . . held that an employee injured while transiently or fortuitously on navigable waters is covered under the Act." 13 F.3d 888 (5th Cir. 1994), *cert. denied*, 513 U.S. 994 (1994). Claimant's reliance on *Randall* is unavailing, as this decision was explicitly overruled in *Bienvenue*, 164 F.3d at 908 (holding that "a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient or fortuitous"). Citing *Brockington*, the court noted that, in so holding, it was aligning itself with the Eleventh Circuit. *Ibid.* Furthermore, unlike the claimant in *Randall*, Claimant was not injured over navigable waters.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire evidence of record, it is hereby ordered that the claim of Marvin W. Cole for benefits under the Longshore and Harbor Workers' Compensation Act be DENIED.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.